

MAY 07 2020

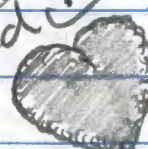
PETER A. MOORE, JR., CLERK  
US DISTRICT COURT, EDNC  
BY  DEP CLK

In the United States District Court

For The Eastern District of North Carolina  
Western Division

I love  
forever  
love

Yest  
Sweet baby  
Dad!!



AA

NO. 5:17-CR-134-BR(1)

United States of America  
Plaintiff

vs

Xavier Milton Earguhart  
Defendant

Ex-parte  
Emergency motion to Dismiss the  
final order of forfeiture pursuant  
to NCGS 39.6-7, NCGS 39A-2(1), and  
Fed R Crim P 12(B)(2) and return any  
and all Seized property and legitimate  
Nonforefizable and untainted funds  
to obtain counsel of his choice or in the  
Alternative request for evidentiary hearing

Comes now Xavier Milton Earguhart In propria persona sui juris defendant  
in error hereinafter "MR. Earguhart" to move this Honorable Court to  
Dismiss the final order of forfeiture pursuant to Fed R Crim P  
12 B 1 1/2 and return any and all seized property and legitimate  
Nonforefizable and untainted funds to obtain counsel of his  
Choice pursuant to Fed R Crim P 41(e) as the Court lacks  
Subject matter and legislative jurisdiction to seize any  
property of MR. Earguhart in connection to the Alleged Violations  
of Count 8 through 10 of the Superseding to wit 18 USC 1344  
(2) MR. Earguhart now shows the following

pg 1 of 16

on or about Dec 2, 2019 the united States court of Appeals for the fourth Cir vacated the sentence and remanded the case to the instant court

The instant motion can be granted as the court has jurisdiction to rule upon the merits of the instant motion pursuant to Fed R Crim P Rule 12 B 132 which states "motions that may be made at any time. A motion that the court lacks jurisdiction may be made at any time while the case is pending"

Final judgment in the instant case has not been entered as of this date

Pursuant to 18 USC 982(A)(2) the court in imposing sentence on a person convicted of a violation of 18 USC 1344 affecting a Financial institution shall order that the person forfeit to the united States any property/constituting or derived from proceeds the person obtained directly or indirectly as the result of such violation

Pg 2 of 16



Pursuant to the forfeiture notice of the superseding indictment the United States of America sought MR. Farguhart to forfeit any property constituting or derived from the gross proceeds obtained directly or indirectly as a result of the said offense including but not limited to:

(A) \$ 1,304,804.71 constituting the gross proceeds of the charged offenses;

(B) \$ 291,903.31 in Gold Bullion Coins and

(C) Recording Studio Equipment

A. 2 Genelec 8351 APM Monitors

B. 1 Genelec 7360 APM Smart Active sub

C. 1 GLM Loud Speaker Manager V2.0

D. 1 Sony C800-PC

E. 1 SSL AWS 948 Demo SN SWS 4237

The Congressional intent of forfeiture is limited to property constituting or derived from proceeds the person obtained directly or indirectly as the result of such violations All of the Aforementioned

Pg 3 of 14

items the government sought as forfeitable property are alleged to have been obtained from counts 8 through 10 of the superseding indictment however the government has misapplied the title 18 usc 1344(2) statute to MR. Earguhart's Alleged Conduct as the essential elements of 18 usc 1344(2) is the "property is owned by or under the custody and control of a financial institution" By means of The government failed to meet the burden of proof that the Alleged Victim was a financial institution and therefore the essential element of 18 usc 982 (A)(2) has not been met as the Alleged violations of 18 usc 1344 did not affect a financial institution and therefore the court lacks subject matter and legislative jurisdiction to enter a order for forfeiture

On or about 2-22-2018 a 13 count superseding indictment was handed down against MR. Earguhart the superseding indictment charged MR. Earguhart with Bank fraud in violation of 18 usc 1344 for counts 1-10 Engaging in Monetary Transactions Involving Criminally Derived Property in violation of 18 usc 1957 and Aggravated Identity theft in violation of 18 usc 1028 A (A)(1) the

pg 4 of 16



Superseding indictment that the property was subject to forfeiture as proceeds of MR. Earquhart Alleged Bank fraud and money laundering violations

MR. Earquhart has filed the instant motion to move the Court to Dismiss the final order of forfeiture pursuant to Fed R. Crim p. Rule 12B \_\_\_\_\_ and return any and all seized property and legitimate non forfeitable and untainted funds to obtain counsel of his choice or in the Alternative request the Court to grant an Evidentiary hearing to determine if the seized funds and or property should be released so that MR. Earquhart can retain Counsel and pay defense cost

The government seized all of MR. Earquhart's substantial assets in 2018 which has prevented him from using his own legitimate assets to fund his criminal defense MR. Earquhart has a Sixth amendment right to use his legitimate property to hire the Attorney of his choice and he has been deprived of that right without a meaningful opportunity to be heard in violation of the due process clause

Pg 5 of 16

The Supreme court has made clear that a Criminal defendant has no Sixth amendment right to use illegally obtained funds to hire an attorney. In *Caplin & Drysdale v. United States*, 491 US 617 (1989) the court concluded that any Sixth Amendment right to obtain counsel of choice does not extend beyond the individual's right to spend his own legitimate nonforfeitable assets. *Caplin* 491 US at 624-33. The court explicitly rejected "any notion of a Constitutional right to use the proceeds of crime to finance an expensive defense" *Id.* at 630 109 S. Ct. 2646

For the foregoing reasons MR. Earguhart's legitimately nonforfeitable and unainted funds and property wrongfully seized

The superseding Indictment ("charging instrument") which alleged at count 8 through 16 violation of 18 USC 1344 (2) The charging Instrument asserts and alleged that MR. Earguhart executed and attempted to execute the scheme and artifice in that he caused foreclosed properties to be sold to a victim buyers through holding companies when in fact the victim lien holders were financial institutions

pg 6 of 16



as defined in 18 USC 20 Maintained lien(s) that were extinguished by means of a fraudulent satisfaction as it is alleged that Mr. Earquhart caused fraudulent satisfaction(s) of security instruments to be filed and recorded by the register of Deeds office it is further alleged the fraudulent satisfaction purported to extinguish any claim to the Foreclosed property by the victim lien holder

MR. Earquhart's property and funds were unlawfully seized as the record reflects by and through the Deeds of trust and the sworn testimony of William Nultman vice president of Mortgage Electronic Registration System which both were entered as trial evidence proves that the subject property was not owned by or under the custody or control of a financial institution Each deed of trust regarding counts 8 through 10 of the Charging Instrument were created and established pursuant to North Carolina state law to wit NCgS 39-6.7 and NCgS 39A-2(1)

Pursuant to North Carolina general statute 39-6.7(A) Construction of conveyance to or by trusts A deed will, beneficiary designation or other instrument that

Pg 7 of 16

Purports to convey devise or otherwise transfer any ownership or security interest in real or personal property to a trust shall be deemed to be a transfer to the trustees or trustee of that trust

The following Language is included under the provision of Each deed of trust titled "Transfer of rights in the property" Borrower Irrevocably grants and Conveys to trustee and trustees successors and assigns in trust with power of Sale to the following described property located in the County of (county name) legal Description attached hereto and made a part here of which currently has a Address of (property, address) north carolina (zip code) to have and to hold this property unto trustee and trustees successors and assigns forever together with all the improvements now or hereafter erected on the property and all easements appurtenances and fixtures now or hereafter a part of the property

Pursuant to NCgS 394-2(1) a "transfer" is the Sale, gift, Conveyance, assignment inheritance, or transfer of an ownership interest in real property

Pg 8 of 16



located in this state According to each Deed of trust the "Borrower Irrevocably grants and Conveys to trustee and trustees Successors and assigns in trust with power of sale to the following described property"

Pursuant to North Carolina Statute 39.67 and 39A-2(1) The Borrower of each deed of trust conveyed the power of sale and the property to the trustee and trustees Successors and assigns and therefore the property was under the Custody and control of the Trustee and the property interest and power of sale granted to the trustee was owned by the trustee listed with in each Deed of trust presented as trial evidence to Convict MR. Farguhar

The trustee listed within each deed of trust were human beings acting in the capacity of the standing trustee for Each Deed of Trust or a limited liability companies "LLC" MR. Farguhar exercised his right to go to trial and subsequently the jury instructions for Counts 8-10 the jury was not charged to find that the trustee of any deed of trust were financial institution within the meaning of 18 USC 20 Since the borrower

Pg 9 of 16

of Each deed of trust conveyed the property and power of Sale to trustee and therefore no offense was committed against the United States of America

W. Earl Britt held in the Sutherland v. Wells Fargo Bank N.A (EDNC 2013) case legal title to the property remains in the trustee See Sprouse v. N. Rivers Ins (v., 344 S.E 2d 558, 559 (NC Ct App 1986) and ("The deed of trust results in legal title to the property being in the trustee")

The principles governing the Construction of Deed of Trust instruments are well established in North Carolina in Construing a deed of trust a court must consider the language and terms of the instrument as a whole the rule of construction is that Recognition shall be given to the expressed intention of the parties to a deed or other conveyance and that it shall be construed as to effectuate the intent of the parties

A deed of trust is an instrument in use in some states taking the place and serving the use of a mortgage by which the legal title to real property

pg 10 of 14



is placed in one or more trustees to secure the repayment of a sum of money or the performance of other conditions through differing in form from mortgage it is essentially a security

Black's Law Dictionary Abridged Sixth Edition Centennial Edition (1891-1991 pg 286)

Power of Sale - A clause commonly inserted in mortgages and deeds of trust, giving the mortgagee (or trustee) the right and power, on default in the payment of the debt secured to advertise and sell the mortgaged property at public auction (But without resorting to a court for authority) satisfy the creditor out of the net proceeds convey by deed to the purchaser, return the surplus if any to the mortgagor and thereby divest the latter's estate entirely, and without any subsequent right of redemption (Id pg 812)

Pursuant to NCGS 39-6.7 and 39A-2(1) Each Deed of trust used to convert Mr. Earquhart legal title and the power of sale was "Irrevocably granted and conveyed to the trustee and trustees successors and assigns in trust with power of sale" for each property in

Pg 11 of 16



Count 8 through 10 of the superseding indictment and therefore the property's were not owned by or under the custody and control of a financial institution as a essential element of the 18 USC 1344(2) Bank fraud Statute and therefore the court lacked jurisdiction to seize MR. Earguhart's funds and property

MR. Earguhart has proceeded to trial with incompetent counsel and subsequently was found guilty on all charges MR. Earguhart filed a direct appeal and won the court of appeals vacated and remanded his case however MR. Earguhart's trial counsel has been reappointed and said counsel has made many errors during and prior to the start of his trial said counsel has also failed to provide any services upon MR. Earguhart case being remanded and counsel being reappointed The Emergency motion for continuance of sentencing and appointment of new counsel and the complaint MR. Earguhart filed with the American Bar Association shows that upon remand counsel has failed to object to the rough draft PSR within the time allotted by statute; counsel refuses to contact MR. Earguhart despite the request made by usps mail

pg 12 of 16



and Email She has failed to provide him with legal papers necessary to mitigate the sentence that may be imposed upon resentencing. In 2018 Counsel of Record made many removable errors which include but are limited to the following

- failed to object to the substantial financial hardship Enhancement said enhancement was enacted on 11-1-2015 MR. Earguarta Alleged Criminal Activity Enacted on or about August 2015 (see #12 of DE 255) said Enhancement is a Ex-post facto violation as he was sentenced under the 2016 guideline

- failed to file motions to dismiss pursuant to Fed R Crim P 12 (B)(3)(B)(V) NCgs 39-127 and NCgs 39A-2(1) Count 8-10 said counts exposed MR. Earguarta to several Enhancements which increase his sentence Exposure from 1-12 months to 384 months said state statute controls the factors of Count 8-10 as the alleged violations deal with North Carolina Real Estate Conveyances

pg 13 of 14



- failed to object to the flawed jury instructions for counts 1-10 (Bank fraud 18 USC 1344) as the scope of "Scheme or Artifice" was defined beyond the Supreme court case "Skilling v. United States" (2010) in said case the court limited the term to include Bribery and Kick back and MR. Earguhart was not instructed for either
- failed to object to prohibited amounts included in the restitution order pursuant to USSC 2B1.1 cmt 3(D)(i) requested by Deutsche Bank in the amount of \$121,566.93 and the full amount was granted This fee included lawyers fees and other prohibitional fees

MR. Earguhart and court appointed counsel of record has blatantly disregarded MR. Earguhart request to file motions and provide him with legal material that are necessary for him to Allegeit at sentencing in his best interest and provide him with effective assistance and there fore has caused irreconcilable differences the relationship between MR. Earguhart and counsel of record has entirely broken down as Counsel has willfully failed to represent his interests adequately

pg 14 of 14



Without the numerous errors Counsel had  
Mr. Earguhart would not have been subjected to a  
384 month sentence It is in Mr. Earguhart's  
Best interest to Hire Counsel that is not compensated  
by the plaintiff which also happens to be a  
Conflict of interest if the court fails to grant the  
instant motion Mr. Earguhart will further suffer  
prejudice Mr. Earguhart Counsel has disclosed to  
him that she lost her mother between Feb - April  
of 2020 and prior to that and up until this point  
her performance has been below competent standards  
and the Death of her mother subjects her to  
mental and emotional anguish and the possibility  
of her continuing to provide less than acceptable  
Effectiveness legal representation

Because the Elements of Count 8 through 16 were  
not pursuant to NCgs 39-16.7 and 39A-2(1) which  
controls North Carolina Real Estate Conveyances  
Therefore Counts 8 through 16 Failed to state  
an offense against the United States of America  
and Mr. Earguhart property and funds were seized  
in Error

Pg 15 of 16



Respectfully Submitted  
This 4<sup>th</sup> Day of May 2020

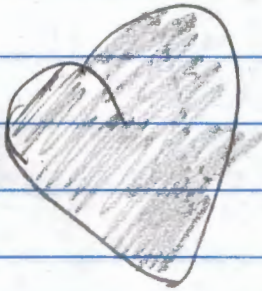
In propria persona Sui Juris  
Defendant

# 09960687

Xavier Milton Farguhart

801 Industrial Park Rd

Farmville VA 23901



AA Dad  
loves you  
now and  
forever!

Pg 16 of 16